BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICK L. KEININGHAM Claimant VS. **GATES RUBBER COMPANY** Respondent AND **INS. CO. OF STATE OF PENNSYLVANIA** Insurance Carrier	)	Docket No. 1,021,232

ORDER

Respondent and its insurance carrier request review of the May 6, 2005 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's accidental injury arose out of and in the course of employment and that claimant gave timely notice.

The respondent requests review of the following: (1) whether the accident arose out of and in the course of employment; (2) whether timely notice was given; and, (3) whether timely written claim was made.

Claimant argues he has met his burden of proof regarding accidental injury, giving notice and timely written claim and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Mr. Keiningham began working as a braider operator for Gates Rubber Company on July 22, 2002. His job involved running a hose through a machine that would wrap strands of wire around the hydraulic hose and then coat it with plastic. This required the claimant to use his thumbs, hands, wrists and arms in a repetitive, forceful manner.

Before claimant began working for respondent he had been diagnosed with arthritis in both thumbs. As claimant performed his job for respondent he began to experience pain in his thumbs, hands, and wrists which worsened over time. He told Virginia Utley, a supervisor, that he was having increased symptoms in his hands. The respondent did not offer any medical treatment nor did the claimant ask for treatment. Claimant explained that he did not ask for treatment mainly because he did not want to cause any problems at work.

On June 2, 2003, during an office visit with his personal physician, Dr. Kevin Mosier, the claimant mentioned he was having increased pain in his right thumb. Claimant continued to work even though the condition in his hands, wrists and thumbs was worsening. Then on June 14, 2004, on a return visit to Dr. Mosier, the claimant again discussed his thumb problems and was given some medication. He was advised to return on an as-needed basis.

As claimant continued working he suffered a specific injury while picking up a bobbin which caught and caused pain in both of claimant's wrists. It was claimant's uncontradicted testimony that he reported the incident to his supervisor at that time, Jim Aikens. Claimant noted that an accident report was filled out and he was interviewed by the safety committee.

Claimant continued working but his pain worsened. On August 25, 2004, claimant saw Dr. Mosier who noted claimant's symptoms had progressed to an almost disabling level and recommended surgery to claimant's right thumb which was performed on August 31, 2004. Claimant was released by Dr. Mosier to return to light-duty work with no forceful gripping. Respondent placed claimant in an accommodated position. But in this position, the claimant was painting take-up reels with a paint roller and hand brush eight hours a day. On January 3, 2005, Dr. Mosier placed permanent restrictions on the claimant to avoid forceful repetitive gripping with the hands. Claimant was terminated on January 10, 2005, because respondent was not able to accommodate claimant's restrictions.

The claimant's supervisor, Virginia Utley, denied claimant made any complaints that he was having problems with his wrists or hands. And Ms. Utley testified that when claimant took time off for his thumb surgery she had asked what had caused the problem and claimant replied it was from his repetitive work performed for a previous employer. Claimant denied he told Ms. Utley the surgery was for an old problem. Finally, Ms. Utley agreed that she was aware the safety committee had met with claimant regarding the accident lifting the bobbin.

Respondent's human resources manager, Teri Porter, testified that when claimant brought a doctor's note about his thumb surgery he had indicated he was having surgery because of his work performed for a previous employer. Ms. Porter further testified she was aware of the incident where claimant had injured his wrists but noted he had never requested medical treatment as a result of that incident.

Respondent argues claimant never made timely notice of his alleged injuries. This argument disregards the claimant's uncontroverted testimony that he told his supervisor of a specific injury to his wrists. Claimant further testified he had several supervisors during the time he worked for respondent and he had frequent discussions with his supervisors that he was having ongoing problems with his hands, thumbs and wrists.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

It is undisputed claimant provided notice of the specific incident lifting the bobbin which he claimed injured both wrists. The evidence is disputed whether claimant provided notice that he was suffering ongoing problems with his wrists, thumbs, and hands as he continued to work.

Two of respondent's representatives testified before the ALJ and disputed claimant's testimony that he had indicated he was having problems with his wrists hands and thumbs while performing his work. Where there is conflicting testimony credibility is an important issue. Here, the ALJ had the opportunity to personally observe the claimant and two of respondent's representatives testify in person. The ALJ apparently believed the claimant's testimony over respondent's representatives. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to personally observe and judge the credibility of the claimant and two of respondent's representatives.

Therefore, the Board concludes, for preliminary hearing purposes, that claimant provided timely notice of his work-related accidents.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[1] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[2]

The claimant admitted he had some preexisting arthritic problems with his hands but as he performed his work activities for respondent he developed worsening problems with his wrists, hands and thumbs. Dr. Edward J. Prostic attributed claimant's upper extremity conditions to his repetitive work activities with respondent. Based upon the record compiled to date, the claimant has met his burden of proof that he suffered accidental injury arising out of and in the course of his employment with respondent.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[3]

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Thomas Klein dated May 6, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2005.

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Brian J. Fowler, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

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[1] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[2] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

[3] K.S.A. 44-534a(a)(2).